

**FARRIS MATHEWS BRANAN  
BOBANGO & HELLEN PLC**

ATTORNEYS AT LAW

REC'D TN  
REGULATORY AUTH.

HISTORIC CASTNER-KNOTT BUILDING  
618 CHURCH STREET, SUITE 300  
NASHVILLE, TENNESSEE 37219

(615) 726-1200 telephone  
(615) 726-1776 facsimile

01 FEB 15 PM 1 57

OFFICE OF THE  
EXECUTIVE SECRETARY

February 15, 2001

**VIA HAND DELIVERY**

Mr. K. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

**Re: Amendment to the Application of Memphis Networx, LLC for  
a Certificate of Public Convenience and Necessity to Provide  
Intrastate Telecommunications Services and Joint Petition of  
Memphis Light, Gas and Water Division, a Division of the  
City of Memphis, Tennessee ("MLGW") and A&L Networks -  
Tennessee, LLC ("A&L") for Approval of Agreement Between  
MLGW and A&L Regarding Joint Ownership of  
Memphis Networx, LLC  
Docket No. 99-00909**

Dear Mr. Waddell:

Enclosed for filing please find the original and thirteen (13) copies of Tennessee Cable Telecommunications Association, and Time Warner Communications, Inc.'s Motion to Compel Responses to Data Requests in the above-referenced docket. Copies are being served on parties of record.

If you have any questions, please contact me.

Very truly yours,

**FARRIS MATHEWS BRANAN  
BOBANGO & HELLEN PLC**

*Charles B. Welch, Jr.*  
Charles B. Welch, Jr.

CBW:lw  
Enclosures

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

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IN RE:

APPLICATION OF MEMPHIS NETWORKX, LLC  
FOR A CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY TO PROVIDE INTRASTATE  
TELECOMMUNICATION SERVICES AND JOINT  
PETITION OF MEMPHIS LIGHT GAS & WATER  
DIVISION, A DIVISION OF THE CITY OF  
MEMPHIS, TENNESSEE ("MLGW") AND A&L  
NETWORKS-TENNESSEE, LLC ("A&L") FOR  
APPROVAL OF AGREEMENT BETWEEN MLGW  
AND A&L REGARDING JOINT OWNERSHIP OF  
MEMPHIS NETWORKX, LLC.

Docket No. 99-00909

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**MOTION TO COMPEL RESPONSES TO DATA REQUESTS SUBMITTED  
BY TENNESSEE CABLE TELECOMMUNICATIONS ASSOCIATION  
AND TIME WARNER TELECOM, INC.**

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**COME NOW** Intervenor Tennessee Cable Telecommunications Association ("TCTA") and Time Warner Telecom, Inc. ("Time Warner"), pursuant to Rule 1220-1-2-.11(9) of the Tennessee Regulatory Authority ("TRA") and Rule 37 of the Tennessee Rules of Civil Procedure, and hereby file this Motion to Compel Discovery Responses to the Applicant, Memphis Networkx, L.L.C. ("Memphis Networkx"), and the Joint Petitioners, Memphis Light, Gas & Water ("MLGW"), A&L Networks-Tennessee, LLC ("A&L") and Memphis Broadband, LLC ("Memphis Broadband").<sup>1</sup>

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<sup>1</sup> The style of the Amendment to the Application still references a Joint Petition of MLGW and A&L for approval of an agreement between MLGW and A&L regarding joint ownership of Memphis Networkx. A&L has filed an amendment to its Application, indicating that its membership interest in Memphis Networkx has been sold to Memphis Broadband.

## **RELEVANT FACTS**

Applicant and Joint Petitioners make six (6) general objections to the Data Requests. Applicant and Joint Petitioners argue that discovery has been limited in scope to the Amended Application by Pre-Hearing Officer Richard Collier. (Objection No. 1). Applicant and Joint Petitioners argue that they need not respond to requests for information “pertaining to commercially sensitive, confidential information.” (Objection No. 2). Applicant and Joint Petitioners argue that the Data Requests improperly seek information relating to events that transpired prior to the date of the transfer in ownership from A&L to Memphis Broadband on November 29, 2000. (Objection No. 3). Applicant and Joint Petitioners argue that the Data Requests seek information that is irrelevant to the limited scope of the “supplemental proceedings.” (Objection No. 4). Applicant and Joint Petitioners object to discovery requests pertaining to any entities other than MLGW, Memphis Network and Memphis Broadband. (Objection No. 5). Finally, Applicant and Joint Petitioners object to requests for documents which they claim are privileged under Tennessee law. (Objection No. 6).

## **ARGUMENT**

Pursuant to Rule 1200-1-2-.11(9), motions to compel discovery shall be accompanied by a copy of the discovery request that shows the question and objection or response and shall state the reasons supporting the motion with reasonable specificity. TCTA and Time Warner argue that the objections of Applicant and Joint Petitioners are unfounded and the information requested is discoverable. The information requested could lead to relevant evidence relating to the issue which the

parties identified and as requested by the TRA after the hearing. TCTA and Time Warner now list the specific Data Requests to which they seek to compel discovery along with the objection or response given by the Applicant and Joint Petitioners and the reasons why this withheld discovery should be compelled.

**1. Any Fact or Circumstance Which is Related to the Amendment to the Application of Memphis Networx and Joint Petition of MLGW and A&L is Discoverable.**

Documentation which is related in any way to the amended application is clearly discoverable. Applicant and Joint Petitioners have raised new issues in the amended application which are documented, or alleged to be documented, by information not previously provided to TCTA and Time Warner. Applicant and Joint Petitioners seek to limit discovery to issues they deemed raised by the amended application. However, a new member has been added and all information raised by the addition of this new member (and thus, the departure of the ole one) in the amended application is discoverable. Applicant and Joint Petitioners argue that they are not required to provide information relating to events that transpired prior to the date of the transfer in ownership from A&L to Memphis Broadband on November 29, 2000. However, any information which relates to the amendment to the application -- whether such information relates to facts which occurred before or after November 29, 2000 -- is discoverable. In fact, (as has been the case throughout this proceeding) the course of events prior to a date certain may be as important as those events which occurred afterward.

**2. Applicant and Joint Petitioners Have a Duty to Supplement Responses to Previous Data Requests When They Obtain Information Making Previous Responses Incorrect.**

Rule 26.05(2) of the Tennessee Rules of Civil Procedure provides that a party who has responded to a request for discovery is under a duty to “seasonably amend” a prior response if the party obtains information making the response to the request no longer true and that a failure to amend the response is in substance a knowing concealment. Tenn. R. Civ. P. 26.05(2). Thus, Applicant and Joint Petitioners, regardless of the scope of discovery “re-opened” by the Pre-Hearing Officer, must supplement the responses to previous Data Requests with new information obtained because such responses may now be incorrect. The scope of the new discovery does not eliminate this requirement to supplement and amend prior discovery responses.

**3. A&L is Still a Party to These Proceedings and No Objection to Discovery Should be Allowed Because TCTA and Time Warner Seek New or Supplemented Information from A&L.**

A&L is still a party to these proceedings. There has been no motion made to substitute Memphis Broadband for A&L. Clearly, an amendment to Memphis Networkx’ application has been filed, but the TRA has not decided at this time whether or not to grant the amendment or the application. Therefore, it is not a basis for objection that Memphis Networkx and Memphis Broadband are the only entities “involved in the filing” of the amendment as Applicant and Joint Petitioners argue at Objection No. 5. Memphis Broadband seeks to take the place of A&L and the information relating to this sale or acquisition is clearly relevant to circumstances surrounding the amended application. Simply put, the public has been assured that Mr. Lowe is no longer

involved, directly or indirectly, with their project. Several of these requests are aimed exploring those representations.

#### **4. Reasons to Compel Responses to Specific Data Requests:**

With regard to objections made to specific Data Requests, TCTA and Time Warner provide the reasons supporting their Motion to Compel:

**Request No. 1(b): Produce a copy of any and all documentation evidencing the sale of the membership interest of A&L in Memphis Networkx to Memphis Broadband, including all closing documents and including documentation identifying all individuals who had any involvement with such sale.**

Response: Applicant and Joint Petitioners object to the overly broad nature of this request. Applicant and Joint Petitioners object for the reasons set forth in objections # 1, 2, 4, 5, 6.

Reasons to Compel: This request does not seek information that is overly broad. It seeks documentation evidencing the sale of the membership interest of A&L to Memphis Broadband, the sole reason for the proposed amendment to the application. Applicant's and Joint Petitioners' objections made on other grounds are not well taken as this documentation is clearly relevant and discoverable as it relates solely to circumstances surrounding the amended application.

**Request No. 4: Identify when Memphis Broadband, Memphis Angels, M-Net 2000 and Belz Broadband were formed and set forth their business structures, listing all parent companies, subsidiaries, affiliates, present and former officers, employees, agents, directors and all other persons acting or purporting to act on behalf of these entities. Provide a copy of the charter and a list of all shareholders (or comparable investors if not organized as a traditional corporation) of these entities if not previously provided.**

Response: Applicant and Joint Petitioners object to this request due to its overbroad nature which seeks information from entities that are not before the Authority in this docket. With regard[s] to Memphis Broadband, the only entity cited which is before the Authority, the formation information and organizational chart were previously supplied

with the Amendment to the Application and Joint Petition, Exhibits T, S. With regard[s] to the other entities, Applicant and Joint Petitioners object for the reasons set forth in objections # 1,2,5.

Reasons to Compel: The information sought is not overbroad. Formation and business structure information from Memphis Angels, M-Net 2000 and Belz Broadband is clearly relevant and clearly discoverable. These artificial entities are listed in Paragraph 6 of the amended application as owners of Memphis Broadband. Identification of the structure and formation of these entities, as well as their directors and other individuals, is wholly proper and relevant as it directly relates to issues raised in the amended application and within the scope of discovery. Any documentation or information which identifies the ultimate owners and managers of entities is within the scope of discovery.

**Request No. 5: Provide a copy of any business plans since October of 1999 of A&L, Memphis Broadband, Memphis Networkx, Memphis Angels, M-Net 2000, Belz Broadband or any entity in which Mr. Lowe has any interest whatsoever.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1-4 above with respect to the request for plans from A&L, Memphis Broadband, Memphis Angels, M-Net 2000, Belz Broadband, or any entity in which Mr. Lowe has any interest whatsoever. . . . Applicant's plan to provide the proposed services in Shelby County as set forth in Sections 7 and 8 of the original Application and Joint Petition as not changed. Memphis Networkx has previously filed 3 year pro formas and capital budgets as Confidential Exhibit H. There is no requirement to submit any further detailed business plans in order to obtain approval from the Authority.

Reasons to Compel: As stated above, formation and business structure information from Memphis Angels, M-Net 2000 and Belz Broadband is clearly relevant and clearly discoverable as these entities are listed as owners of Memphis Networkx in the amended application. Applicant and Joint Petitioners have previously testified that there have been no written updates of business plans since the October 1, 1999 plan, and TCTA

and Time Warner merely seek information on business plan updates since the date of the hearing in this matter. This information is within the scope of the “re-opened” discovery and also falls within the scope of information which must be supplemented pursuant to Rule 26.05(2) of the Tennessee Rules of Civil Procedure. Any plan or other documentation which could lead to relevant evidence regarding the managerial, technical or financial ability of the Applicant or Joint Petitioners to provide the proposed services is discoverable. Memphis Networx witnesses have testified about “bridging the digital divide.” The business plans may provide information relating to this testimony.

Request No. 6: Provide a detailed breakdown identifying “Prior Costs” and “Subsequent Costs” as those terms are defined in the Amendment to the Application and Joint Petition at Articles 1.39 and 1.41.

Response: Applicant and Joint Petitioners object for the reasons set forth in #3. Subject to and without waiver of the foregoing objection, the definition of “Prior Costs” has not changed in the Amended and Restated Operating Agreement; a breakdown of these costs may be found in Exhibit 25. With regards to “Subsequent Costs,” a further response will be filed in a supplemental filing.

Reasons to Compel: TCTA and Time Warner have the right to receive documentation of the breakdown of “Prior Costs” and “Subsequent Costs” regardless of whether this seeks information prior to November 29, 2000. These terms are revised in the amended application and within the scope of discovery. As of the date of the filing of this Motion to Compel, TCTA and Time Warner have not received a further response with regard to “Subsequent Costs” and reserve the right to compel the discovery requested.

**Request No. 7: Provide a detailed breakdown identifying “Subsequent Costs” as that term is defined at Article 1.41 of the Amended and Restated Operating Agreement.**



Response: Please see response to #6 above.

Reasons to Compel: See reasons given for compelling response to Request No. 6.

**Request No. 8: Provide documentation evidencing that MLGW has made Capital Contributions to Memphis Networx of \$2,795,185.00 and that Memphis Broadband has made Capital Contributions to Memphis Networx of \$2,789,359.60 as stated in Article 9.1(a) of the Amended and Restated Operating Agreement, and evidencing all other cost calculations for figures listed at Article 9.1(a).**

Response: Applicant and Joint Petitioners object for the reasons set forth in objection #3. To the extent applicable, Applicant and Joint Petitioners also object for the reasons set forth in objection #2. Subject to and without waiver to the foregoing objections, a further response will be filed in a supplemental filing.

Reasons to Compel: The figures listed regarding MLGW's and Memphis Broadband's Capital Contribution are newly added to the amended operating agreement. Thus, documentation regarding these contributions is discoverable. As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 10: Provide a copy of any agreement or other documentation between A&L, Memphis Broadband, MLGW and/or any third party relating in any way to the substitution of Memphis Broadband as a member.**

Response: Agreements or documentation relating to the substitution of Memphis Broadband have been previously supplied by the Applicant and Joint Petitioners. To the extent applicable, Applicant and Joint Petitioners object for the reasons set forth in objection #1, 2, 4, 6. (See Exhibits U, X to the Amendment to the Application and Joint Petition.)

Reasons to Compel: None of the listed objections is relevant to this Request.

Documentation between A&L, Memphis Broadband, MLGW and/or any third party relating in any way or which gave rise to the substitution of Memphis Broadband as a

member is absolutely relevant and discoverable as it goes to the heart of the amended application.

**Request No. 12: Identify and provide a copy of any and all contracts or agreements entered into between MLGW and Mr. Alex Lowe or any entity in which Mr. Lowe acts in a representative capacity since October 1, 1999. Identify whether any such contract or agreement has been extended in any manners since the parties entered into any contract or agreement.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections 1, 3, 4, 5. Subject to and without waiver of the foregoing objections, there are no contracts between Mr. Lowe and MLGW that relate in any way to the Memphis Network project.

Reasons to Compel: Applicant and Joint Petitioners answer this Request, after a broad objection, by stating that there are no contracts between Mr. Lowe and MLGW that relate in any way to the Memphis Network project. TCTA and Time Warner have asked for all contracts or agreements between Mr. Lowe and MLGW, not only those that relate to Memphis Network. This information is clearly relevant as Applicant and Joint Petitioners have summarily indicated that Mr. Lowe is no longer involved in this matter and must provide documentation regarding contractual obligations or other agreements which may or may not support this allegation. The fact that the respondents declare that there are no agreements that relate to Memphis Network may demonstrate that one or more agreements exist between the parties. Whether or not the agreements relate to Memphis Network can be determined by the Authority. At the hearing, proof was presented of a \$40,000,000 contract between Lowe and MLGW to install, among other things, conduit. In addition, representatives with the Applicant have consistently advised the public that Mr. Lowe is out and there are no "side deals."

**Request No. 15: Produce copies of all invoices and shipping orders for cable or conduit purchased by MLGW and referred to in Article 9.1(a) of the Amended and Restated Operating Agreement.**

Response: Section 9.1(a) refers to capital contributions to Memphis Networkx related to the purchase of cable by Memphis Networkx. Neither MLGW nor Memphis Networkx has purchased any conduit. MLGW has not purchased any cable. Information concerning the purchase of cable by Memphis Networkx will be filed in a supplemental filing.

Reasons to Compel: As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 17: Provide a copy of all documentation evidencing MLGW's audit of the expense "true up" discussed in Article 9.1 of the Amended and Restated Operating Agreement.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections 1, 3, 4. Subject to and without waiver of the foregoing objections, a further response will be filed.

Reasons to Compel: As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 18: Identify and provide any and all documents regarding the amount of joint and common costs incurred by MLGW during FY 2000 and the first month of 2001.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1, 3, 4, 5. Subject to and without waiver of the foregoing objections, a further response will be filed.

Reasons to Compel: As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 19: Identify and provide any and all documents showing the dollar amount of joint and common costs allocated to each division of MLGW during FY 2000 and the first month of 2001.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1, 3, 4, 5. Subject to and without waiver of the foregoing objections, a further response will be filed.

Reasons to Compel: As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 20: Identify and provide any and all documents showing the organization expenses incurred by or on behalf of Memphis Network through February 5, 2001.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1 - 6 above.

Reasons to Compel: Documentation showing organization expenses incurred must be updated and accounted for since the last date such information was provided and since the addition of the new member. This information is clearly relevant and none of the objections listed by Applicant and Joint Petitioners applies to allow the withholding of this documentation.

**Request No. 21: Identify and provide any and all documents showing the total payments made to managerial consultants, technical consultants and legal counsel by or on behalf of Memphis Network as of February 5, 2001. Identify the account to which each of these expenditures has been or will be classified.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1 - 6.

Reasons to Compel: Documentation showing payments to consultants and legal counsel must be updated since the last date such information was provided (the last

hearing date) and since the addition of the new member. This information is clearly relevant and none of the objections listed by Applicant and Joint Petitioners applies to allow the withholding of this documentation. During the prior hearings, Applicant relied upon paid consultants (ADL and others) in an effort to show managerial and technical capability.

**Request No. 31: Identify, describe and provide any and all documents Memphis Networx, A&L, Memphis Broadband and/or MLGW may have prepared indicating the economic viability of the Memphis Networx venture or the review or update of Memphis Networx's business plan to reflect changes in the market and customer demand which may have occurred since the filing of the original Application.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1 - 6.

Reasons to Compel: Applicant and Joint Petitioners have previously testified that there have been no written updates of business plans and TCTA and Time Warner merely seek information on business plan updates since the date of the hearing in this matter. This information is within the scope of the "re-opened" discovery and also falls within the scope of information which must be supplemented pursuant to Rule 26.05(2) of the Tennessee Rules of Civil Procedure. Documentation indicating the economic viability of the Memphis Networx venture is relevant as it touches on all aspects of the amended application.

**Request No. 35: Identify each investor and principal of Memphis Broadband that have "direct experience in startup projects in Shelby County" as well as the identity of the startup project (Supplemental Testimony of William Larry Thompson, page 4).**

Response: Applicant and Joint Petitioners object for the reasons set forth in objection #5. Applicant and Joint Petitioners further object to this request insofar as it is

overbroad and burdensome. Subject to and without waiver of the foregoing objections, a response will be filed in a supplemental filing.

Reasons to Compel: Nothing in objection #5 applies to this Data Request. William Larry Thompson, Senior Vice President and Chief Operating Officer of MLGW provided pre-filed supplemental testimony attached to the amended application which stated that the “investors and principals of Memphis Broadband also have direct experience in startup projects in Shelby County.” Identification of these investors is clearly relevant as it relates to new information provided in newly-filed testimony. As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 36: Provide a complete explanation for the term “digital divide” according to MLGW’s, Memphis Broadband’s and/or Memphis Networkx’ understanding of such term and provide a copy of all workpapers and/or studies that have been prepared by or on behalf of MLGW, Memphis Broadband, A&L, and Memphis Networkx that discuss the investment required to bridge the digital divide in Shelby County.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1 - 5. Applicant and Joint Petitioners object to this request insofar as this request implies that Memphis Networkx has represented that it will completely bridge the digital divide in Shelby County. Subject to and without waiver of the foregoing objections, please refer to the testimony of Larry Thompson and Ward Huddleston at the hearing.

Reasons to Compel: Regardless of whether the Data Request “implies” that Memphis Networkx has represented that it will completely bridge the digital divide in Shelby County, the explanation of the term “digital divide” is clearly relevant to the amended application. Also, documentation discussing the investment required to bridge the digital divide in Shelby County is clearly relevant. This topic was discussed in

supplemental pre-filed testimony provided with the amended application. As of the date of filing this Motion to Compel, TCTA and Time Warner have not received a further response in a supplemental filing and reserve the right to compel the discovery requested.

**Request No. 37: Provide a description of the term “underserved area” as used in the prefiled testimony of William Larry Thompson and Andrew Seamons and identify each geographic area within Shelby County that is deemed to be “underserved” according to MLGW, Memphis Broadband and/or Memphis Networx.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objection[] #1 - 5. Subject to and without waiver of the foregoing objections, please refer to the testimony of Larry Thompson at the hearing, and Section 2.5(c) of the Amended and Restated Operating Agreement.

Reasons to Compel: Nothing in objections #1-5 apply to this Data Request. This information is clearly relevant and discoverable as it was discussed in supplemental pre-filed testimony provided with the amended application.

**Request No. 38: Provide the investment of A&L’s ownership interest in Memphis Networx on November 29, 2000 when Memphis Broadband acquired A&L’s membership interest and provide the amount of premium that Memphis Broadband paid to A&L in excess of A&L’s ownership interest in Memphis Networx.**

Response: Applicant and Joint Petitioners object for the reasons set forth in objections #1 - 4. Subject to and without waiver of the foregoing objections, a further response will be provided.

Reasons to Compel: Nothing in objections #1-4 apply to this Data Request. This information is clearly relevant and discoverable as it relates to issues in the amended application by the proposed substitution of a new member and the status of Lowe's account upon withdrawal.

### **CONCLUSION**

For the reasons set forth above, TCTA and Time Warner request that Applicant and Joint Petitioners be compelled to fully, completely and timely respond to the Data Requests properly propounded to them.



Respectfully submitted

**FARRIS MATHEWS BRANAN  
BOBANGO & HELLEN PLC**

By: Charles B. Welch, Jr.  
Charles B. Welch, Jr., 5593  
Steven C. Brammer, 15785  
Attorneys for Tennessee Cable  
Telecommunications Assoc.  
618 Church Street, Suite 300  
Nashville, Tennessee 37219  
(615) 726-1200

**CERTIFICATE OF SERVICE**

I, Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing on the parties listed below on this the 5th day of February, 2001.

Richard Collier, Esq.  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0500

Henry Walker, Esq.  
Boult, Cummings, et al.  
414 Union Avenue, Suite 1600  
P.O. Box 198602  
Nashville, Tennessee 37201-8062

D. Billye Sanders, Esq.  
Waller Lansden, et al.  
511 Union Street, Suite 2100  
P.O. Box 198966  
Nashville, Tennessee 37219-8966

Dana Shaffer, Esq.  
NEXTLINK Tennessee  
105 Molloy Street  
Suite 300  
Nashville, Tennessee 37201

Guy M. Hicks, Esq.  
BellSouth Telecommunications, Inc.  
Suite 2101  
333 Commerce Street  
Nashville, Tennessee 37201-8062

John Knox Walkup, Esq.  
Wyatt Tarrant & Combs  
511 Union Street, Suite 1500  
Nashville, Tennessee 37219-1750

Charles B. Welch, Jr.  
Charles B. Welch, Jr.